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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Plaintiff and Respondent,

v.

FIDEL PADUA et al.,

Defendants and Appellants.

E058392

(Super.Ct.No. CIVDS1105449)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Affirmed.

Fidel Padua and Annadelle Padua, in pro. per., for Defendants and Appellants.

RCO Legal and Jason A. Savlov for Plaintiff and Respondent.

I

INTRODUCTION

Defendants and appellants Fidel Padua and Annadelle Padua (defendants), self-represented litigants, borrowed $333,700 and executed a deed of trust (DOT) on their

residence (the Property), securing a mortgage loan. Defendants defaulted on the loan and in the process of attempting to discharge the debt, recorded a release and reconveyance of the DOT. Defendants appeal from a judgment entered in favor of Mortgage Electronic Registration Systems, Inc. (MERS), following a bench trial on MERS's verified complaint, seeking cancellation of the release and reconveyance; quiet title; and declaratory relief.

Defendants contend the court erred in ordering the release and reconveyance void and canceled; granting quiet title; and ordering defendants restrained from recording any additional documents concerning the Property without trial court consent and a court order. On appeal, defendants argue MERS does not have standing to litigate this matter. Defendants further argue their mortgage debt was discharged because Wells Fargo did not respond to their Affidavit of Obligation and did not object in writing to their tender of the outstanding loan balance. We reject defendants' contentions and conclude MERS has standing to bring this action. We further conclude the evidence shows defendants never properly tendered payment of approximately $380,000 owed to Wells Fargo. Therefore defendants improperly recorded the release and reconveyance documents, which clouded MERS's interest in the Property as Wells Fargo's nominee and beneficiary under the DOT. The judgment is accordingly affirmed.

II

FACTUAL AND PROCEDURAL BACKGROUND

On August 16, 2002, Annadelle Padua executed a grant deed, recorded on October 3, 2002, granting title to the Property, as her separate property, to Fidel and Annadelle, as joint tenants. On October 6, 2004, defendants executed a grant deed, recorded on October 15, 2004, transferring title to the Property to Fidel, as his sole and separate property.

On October 8, 2004, Fidel executed a promissory note in the amount of $333,700, in return for a loan for that amount from Bankerswest Funding Corporation (Bankerswest). On October 8, 2004, Fidel also executed the DOT, securing payment of the promissory note with defendants' residence. Alliance Title was named the trustee. MERS was designated nominee for the lender (Bankerswest) and beneficiary, and is the holder of the promissory note under the DOT. The DOT was recorded on October 15, 2004.

On April 2, 2010, defendants served on John Stumpf, the chairman, president, and CEO of Wells Fargo Bank (Wells Fargo), an "Affidavit of Obligation," which includes a discussion of law, commerce, contractual transactions, and politics. The document further states that Wells Fargo, through Stumpf, was on notice of defendants' demand that Wells Fargo (1) "Present a written, certified statement that the money loaned to [defendants] . . . was loaned from assets of investors and depositors . . . ." or (2) provide "[w]ritten, Certified Proof of the cancellation of all the related computer generated bookkeeping entries associated with the [defendants'] account. Failure on

your part to cancel these computer records or any action by [Stumpf] or your agents to collect on this account will result in immediate reprisal." Defendants attempted to demand proof of Wells Fargo's claim against them on their mortgage loan within 21 days, by April 22, 2010. Defendants cited the Uniform Commercial Code and California Commercial Code section 3501.

Section 3501 of the California Commercial Code states in part: "'Presentment' means a demand made by or on behalf of a person entitled to enforce an instrument (1) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (2) to accept a draft made to the drawee." (Cal. U. Com. Code, § 3501, subd. (a).) Defendants, however, agreed in the promissory note to waiver of their rights of "Presentment and Notice of Dishonor."

Defendants further warned Wells Fargo in the Affidavit of Obligation that failure to respond to defendants' Affidavit of Obligation, "means a fault, UCC 1-201 (16), exists and will cause the mailing of a "'Conditional Acceptance to Contract'" confirming the agreed upon terms stated above, followed by a "'Notice of Default.'"

Defendants sent Wells Fargo a document entitled, "Non-Negotiable Notice of Fault in Dishonor and Opportunity to Cure," dated April 28, 2010, stating that since defendants disputed the loan, the lender was obligated to verify the debt under penalty of perjury within 20 days under the Uniform Commercial Code and "FDCPA." No specific provision was cited. If the lender failed to respond, defendants would enter a notice of default upon the lender.

On May 27, 2010, defendants signed a document, entitled, "Notice of Default," stating that Wells Fargo was in default of "an opportunity to respond to the COMMERCIAL AFFIDAVIT OBLIGATION sent to you on April 02, 2010 by certified mail. You were given the opportunity to rebut the claims made against you by your failure to answer said AFFIDAVIT OF OBLIGATION OF THE ORIGINAL DEED OF TRUST." The notice contains language which states that Wells Fargo owes $1,334,800, which must be paid within three months or the notice of default will be recorded.

On May 27, 2010, defendants also sent Wells Fargo a "Notice of Default in Dishonor, Discharge of Obligation to Pay Instrument and Demand for Reconveyance and Release of Lien." The notice states that the lender (Wells Fargo) failed to respond to defendants' "'Notice and Demand for Full Disclosure of Loan Agreement,'" received on May 10, 2010. Therefore Wells Fargo was in default and was required to return within 10 days the promissory note for $333,700, dated October 8, 2004, and the related DOT. The notice and demand further state that, if Wells Fargo failed to return these two documents to defendants and discharge the debt, defendants would enter a "'Petition for Deposition Before Action'" in the federal court.

On June 14, 2010, defendants signed a Claim-of-Lien, against defendants' property, for defendants' claim of $1,334,800, against the lien debtor, Wells Fargo.

Defendants sent Wells Fargo a Notice of Default and Entry for Default Judgment, dated June 14, 2010, stating that defendants sent Wells Fargo a Notice of Acceptance to Contract and Affidavit of Obligation and, since Wells Fargo did not

respond, Wells Fargo "fully assented to all the actions as described in the contract and therefore have confessed to the following felonies; Believe that Fraud has been Committed and [defendants] hereby seek Damages by this Fraud and Swindle, Bank Fraud, Usury, Peonage, Extortion of Rights, Obstruction of Justice under Fraud, Racketeering, Deprivation of Rights, Conspiracy, Extortion of Money, Land Piracy, impeding the commerce of the Secured Party, and involuntary servitude." Defendants added that all administrative remedies had been exhausted and, since Wells Fargo had not responded, its acquiescence constituted an admission "evidenced by the attached Certificate of Dishonor which will act as a default judgment against [Wells Fargo] who will then be taken in to bankruptcy liquidation whereby all the equity in the name of [Wells Fargo] will be disposed of in a foreign proceeding."

On August 5, 2010, Fidel signed a document, entitled, "Revocation of Deed," stating that defendants were revoking the DOT. Fidel also executed a "Notice of Removal," stating that he was discharging the trustee, First American Title Company, and the nominee and beneficiary, Wells Fargo.

On October 13, 2010, defendants recorded a document entitled, "Full Release of Mortgage," stating that, in consideration of payment of the debt, secured by the mortgage on defendants' property, defendants released the mortgage. October 13, 2010, defendants also recorded a "Reconveyance," stating that trustee reconveyed and released to defendants the DOT. MERS did not authorize the reconveyance and release of the DOT. There remained an unpaid balance on defendants' mortgage totaling

$322,775.42 in principal and interest. Defendants' last payment was in September 2010. Defendants have been in default on their mortgage since October 1, 2010.

On February 24, 2011, Wells Fargo recorded an assignment of the DOT. MERS, as nominee for Bankerswest, assigned all beneficial interest under the DOT to Wells Fargo. Karen Kamnikar, a director of Wells Fargo Home Mortgage,[1] signed the assignment on behalf of MERS, in her capacity as MERS assistant secretary.

On February 28, 2011, Wells Fargo recorded a Notice of Default and Election to Sell Under Deed of Trust. Fidel claimed the assignment was a fraud and void because defendants did not receive proper notice or consent to it. Defendants further claimed their debt was therefore discharged and the instant lawsuit filed against them should be dismissed.

By letter dated January 28, 2012, Fidel notified Wells Fargo that he was tendering electronic fund transfer (EFT) instrument number 1471, in the amount of $380,000 for payment of the outstanding balance of the loan secured by defendants' Property. The "EFT instrument" consisted of a Union Bank check in the amount of $380,000, which stated in the memo area of the check, "EFT ONLY FOR DISCHARGE OF DEBT," and stated on the back of the check, "NOT FOR DEPOSIT, FOR DISCHARGE OF DEBT . . . WITHOUT RECOURSE." On January 31, 2012, the

[1] Wells Fargo Home Mortgage is a division of Wells Fargo Bank, which provides home loans (mortgages). Reference in this opinion to Wells Fargo, encompasses the Wells Fargo Home Mortgage division.

EFT instrument was prepared and directed to Wells Fargo, and Wells Fargo did not return it.

By letter dated March 5, 2012, Fidel provided Wells Fargo with a "Notice of Default, Notice of Discharged [] Debt and Full Reconveyance." Fidel stated in the notice that Wells Fargo had failed to respond to his EFT instrument tendered on January 28, 2012. Therefore, because Wells Fargo tacitly admitted to everything stated in the January 28, 2012, letter and accepted the EFT transfer instrument, the loan debt was discharged.

MERS Files Complaint

MERS has been unable to enforce its rights under the DOT to foreclose on the Property as a result of defendants' recorded reconveyance and release documents. As a consequence, on April 26, 2011, MERS filed a verified complaint against defendants, seeking (1) cancellation of written instruments; (2) quiet title; (3) slander of title; and (4) declaratory relief re: interest in real property. MERS alleged that defendants executed and recorded on October 13, 2010, fraudulent reconveyance instruments entitled, "'Reconveyance'" and "'Full Release of Mortgage.'" The fraudulent reconveyances released the DOT, which MERS did not authorize because defendants had not paid their obligations secured under the DOT. MERS requested the two recorded fraudulent reconveyance instruments declared null and void and set aside because the reconveyance instruments were recorded through fraud. MERS also requested quiet title.

On November 6, 2012, defendants filed a motion to dismiss MERS's complaint

on the grounds MERS lacked standing to bring its lawsuit and defendants tendered payment of the outstanding loan balance. Defendants claimed that in January 2012, defendants directed and forwarded to Wells Fargo an EFT instrument in the amount of $380,000 setting off and discharging defendant's debt secured by the DOT. Defendants further asserted that the debt was extinguished by their offer of performance under Civil Code section 1485.[2]

In December 2012, the trial court heard and denied defendants' motion to dismiss, finding that the "motion is frivolous under the law and totally without merit, having no basis in law." The court further stated in its minute order that "The court again advises defendants that their filings are legally improper and that they should seek representation. Although defendants have the right to self-representation, defendants do not have the right to subject opposing party to the costs of defending frivolous motions. Defendants are advised that in the future, if matters are found to be frivolous, the court will consider issuing monetary sanctions payable to plaintiff for costs." A month later, in January 2013, defendants filed an ex parte motion to dismiss, which the court denied, finding it groundless.

Bench Trial

During the bench trial in January 2013, defendants stated in their written opening statement that the evidence would show that MERS, as nominee for the lender, did not

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[2] "An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent to extinguish the obligation." (Civ. Code, § 1485.)

have standing or authority to file the instant lawsuit against defendants. Defendants asserted that "[t]he MERS paperless system," which monitors transfers and facilitates the trading of mortgage loans registered with MERS, is a "crooked rip-off scheme." Defendants maintained that MERS did not have standing because it "does not hold any promissory notes of any kind. A party must have possession of a promissory note in order to have standing to enforce and/or otherwise collect a debt that is owed to another party."

Edward DeBus testified during the trial that he was currently manager of the transactions department for Wells Fargo Home Mortgage in Maryland. In addition, in approximately 2005, he was appointed as a MERS officer and was a MERS officer at the time of trial. DeBus was appointed through a MERS corporate resolution, signed by Ava Marcus, associate secretary. During the trial, DeBus reviewed an appointment document dated November 10, 2011, which DeBus testified was his appointment "update," which is done annually. DeBus explained that he did not have a "job" at MERS. He only had an officer's appointment with MERS. His job was with Wells Fargo Bank. His duties and responsibilities as a MERS officer included signing documents for MERS.

DeBus further testified that MERS assigned the promissory note secured by the DOT to Wells Fargo, but defendants recorded intervening documents (a reconveyance and full release of mortgage) releasing the promissory note. DeBus stated that under the DOT, MERS is the nominee, acting on behalf of the lender, Wells Fargo, regarding foreclosures and Wells Fargo is entitled to payment on defendants' loan. DeBus

explained the promissory note and DOT obligated the borrower, defendants, to repay borrowed funds. The Property served as collateral security to ensure defendants repaid the funds borrowed under the promissory note.

According to DeBus, at the time of trial, defendants were not current on their loan payments. They had failed to make payments on the loan since October 2010, and had an outstanding principal balance of $322,775, as of January 14, 2013, not including interest. Wells Fargo initiated foreclosure under the DOT but the process was thwarted by defendants recording a reconveyance and full release of defendants' mortgage. No one at Wells Fargo authorized the reconveyance or full release of defendants' mortgage, and no one at Wells Fargo requested the documents be recorded.

During defendant's cross-examination of DeBus, DeBus testified he reviewed the DOT, promissory, and related foreclosure documents. Foreclosure on the Property was delayed because the bank discovered there was an erroneous or fraudulent release of the lien on the Property. DeBus reviewed Fidel's letter and informed Fidel that his EFT documents forwarded to Wells Fargo were not valid US currency, and would not be accepted.

Fidel conceded at trial that he was responsible for recording the DOT reconveyance. He also testified he executed and recorded the full release of mortgage. Fidel sent the reconveyance and release to Wells Fargo, and Wells Fargo did not respond. Fidel further testified that on April 1, 2010, he sent an Affidavit of Obligation to Wells Fargo, and on April 5, 2010, Wells Fargo received it. On January 28, 2012, Fidel met Margarita Segovia, a notary public, who notarized an EFT instrument and

sent it by certified mail to Wells Fargo. Fidel stated that his tender of the EFT instrument constituted a setoff and discharge. He claimed that Wells Fargo was paid $380,000 by this means, via electronic fund transfer. The trial court noted the EFT instrument was a check that the bank could not cash because Fidel wrote on the back, "'Not for deposit.'" Fidel explained this was because the check was "only for setoff and discharge." Fidel maintained that the January 28, 2012 letter and check had the effect of discharging his mortgage debt.

During closing argument counsel for MERS argued defendants borrowed $333,700 on October 8, 2004. Defendants agreed to repay the loan and executed a DOT, which was recorded. Defendants were not current on their payments on the loan. There was an outstanding principal balance of $322,775. Fidel's EFT instrument could not be cashed and the funds could not be withdrawn from defendants' account. Therefore no funds could be transferred from defendants to MERS. There was no setoff or discharge of the debt by means of the EFT. Wells Fargo did not waive any objection to defendant's claim of setoff and discharge. Therefore MERS requested the court to set aside defendants' recorded reconveyance and release documents under Civil Code section 3412.[3]

Fidel argued during closing argument that defendants' mortgage loan was discharged and satisfied by the EFT instrument received by Wells Fargo on January 30,

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[3] "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Civ. Code, § 3412.)

2012, since there was no timely written objection to the EFT instrument. Fidel further argued MERS had no standing to bring the instant case because MERS had no legal or beneficial interest in the promissory note and was not entitled to receive any payments on the note. MERS would not suffer any loss by the failure to collect on defendants' outstanding mortgage loan balance. Fidel requested the trial court to dismiss MERS's lawsuit against defendants.

In rejecting Fidel's arguments and ruling in favor of MERS, the trial court stated: "What I can't decide is whether the Paduas actually believe the positions that they have advocated and espoused in this litigation, whether they are victims of the nonsense that's out there [] on the Internet for the general public to look at, or whether this is a transparent ruse that they shamelessly pursued to be able to stay living in a house without paying for it, preventing foreclosure from the date [] they defaulted up until today, the date of trial. [¶] My best guess, just judging the credibility of Mr. Padua and Ms. Padua, their demeanor, they seem like decent people to me. I suspect the former, that they're gullible victims of some groundless legal theories that are out there on the Internet. But it really doesn't matter. Their position has no merit whatsoever." The court added, "The idea that the Paduas can borrow $333,000—whatever it was—to buy a house, refuse to pay the money they borrowed, and keep the house is astonishing."

The trial court entered judgment in favor of MERS and ordered the recorded release and reconveyance documents void and canceled. The court also granted quiet title and ordered that defendants are restrained from recording any additional documents concerning the Property without prior trial court consent.

III

STANDING

Defendants contend the judgment is void because MERS does not have standing to bring this action, since MERS is not the owner or holder of the promissory note. Defendants argue that only the owner and holder of the promissory note and mortgage, or the owner's agent, have authority to file an action enforcing the promissory note. Defendants further argue that, although MERS was designated a nominee for the lender and beneficiary under the DOT, MERS was not assigned the mortgage, Property, or ownership rights of the person designating MERS a nominee. MERS therefore did not have standing to bring the instant lawsuit. We disagree.

As explained in *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*), the "MERS System" is "a method devised by the mortgage banking industry to facilitate the securitization of real property debt instruments. As described in *Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking & Finance* (2005) 704 N.W.2d 784, MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.]" (*Id*. at p. 267.) Under this system, the owner of a promissory note secured by a deed of trust, "is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however,

MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (*Ibid.*)

In the instant case, Fidel Padua agreed in the DOT, which he signed on October 8, 2004, that MERS "is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." The DOT further states that "The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." In addition, the DOT states, "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." Fidel thus agreed in the DOT that, as the lender's nominee and agent, MERS has authority to bring the instant lawsuit against defendants to enforce the promissory note and DOT.

The court in *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 rejected the plaintiff's argument that MERS, as nominee, lacked standing in California to initiate a nonjudicial foreclosure. The *Gomes* court concluded MERS had standing "because under California law MERS may initiate a foreclosure as the nominee, or agent, of the noteholder. As we have explained, Civil Code section 2924, subdivision (a)(1) states that a 'trustee, mortgagee, or beneficiary, *or any of their*

authorized agents' may initiate the foreclosure process." (*Gomes*, at p. 1156, fn. 7.) The court in *Fontenot, supra*, 198 Cal.App.4th 256, a wrongful foreclosure action, also concluded that the trial court did not abuse its discretion in concluding that MERS had authority to exercise the lender's legal rights, including the right to foreclose, since the DOT stated that, as a nominee for the lender and the lender's successors and assigns, MERS had the right to exercise all interests of the lender, including foreclosing on the property. (*Id.* at pp. 262–263, 266–267; see also *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1504 [Fourth Dist., Div. Two].)

Likewise, here, MERS, as the lender's nominee and beneficiary under the DOT, has the right to enforce the lender's interests in the security under the DOT, including enforcement of the right to take any action required to clear fraudulent property encumbrances, to allow foreclosure on the Property. MERS thus has standing to bring the instant case to set aside defendants' fraudulent recorded release and reconveyance of the DOT, which encumbered the lender's security interest in the Property under the DOT.

IV

VERIFICATION OF MERS'S COMPLAINT

Defendants assert that Wells Fargo property transactions manager, Edward DeBus, provided a defective and misleading complaint verification and declaration. Although defendants do not provide any citation to the record, it appears that the declaration defendants are referring to is DeBus's complaint verification declaration (verification) attached to MERS's complaint filed on April 26, 2011. The verification,

dated April 20, 2011, states that DeBus is vice president of MERS and is authorized to verify the complaint on behalf of MERS, acting as nominee under the DOT dated October 8, 2004.

Defendants argue that DeBus's verification was "a fraud on the court" because DeBus testified at trial that he was appointed to be a MERS officer by an associate secretary on November 10, 2011, but he signed the verification before then, on April 20, 2011. In addition, DeBus testified that he works for Wells Fargo and does not work for MERS. DeBus's trial testimony establishes that defendants' contentions challenging the complaint verification lack merit. DeBus testified that, in approximately 2005, he was appointed as a MERS officer and was a MERS officer at the time of trial. DeBus was appointed through a MERS corporate resolution, signed by Ava Marcus, associate corporate secretary.

Although DeBus testified he was appointed a MERS officer on November 10, 2011, which was after he signed the April 20, 2011 complaint verification, DeBus clarified that his appointment as an officer on November 10, 2011 was an appointment "update," which is done annually. He was already a MERS officer, with authority to sign the verification on behalf of MERS, on April 20, 2011. He testified he was originally appointed as a MERS officer in approximately 2005, and was reappointed annually. DeBus remained an officer at the time of trial in 2013. The trial court further clarified this during the trial, explaining to Fidel regarding DeBus's authority to verify the complaint: "Mr. Padua, I think the witness testified that he was appointed on an

annual basis, and this was the most recent one." DeBus confirmed this was true and that he was an officer when he filed the complaint.

Defendants have not established any fraud regarding DeBus simultaneously serving as a MERS officer and being employed with Wells Fargo. DeBus stated he was employed at Wells Fargo and had not been a MERS employee. He had only been an officer of MERS. DeBus explained that he did not have a "job" at MERS. He only had an officer's appointment with MERS. His job was with Wells Fargo Bank. His duties and responsibilities as a MERS officer included signing documents for MERS as a MERS officer.

Defendants further argue that DeBus was not properly appointed as a MERS officer because his appointment was by an associate secretary that did not have authority to appoint MERS officers. Defendant asserts that, under Corporation Code section 307, subdivision (b), an officer must be appointed by corporate resolution signed by the corporation's directors. Corporation Code section 307, subdivision (b), does not address appointment of corporate officers. Defendants have not cited any legal authority or evidence establishing that DeBus's appointment or reappointment as an officer was improper. (See *Ramanathan v. Bank of America* (2007) 155 Cal.App.4th 1017, 1026.)

V

EXTINGUISHMENT OF DEBT BY OPERATION OF LAW

Citing *Randone v. Appellate Department* (1971) 5 Cal.3d 536 (*Randone*), defendants contend the DOT was extinguished and their $380,000 debt discharged by

operation of law under the Administrative Procedure Act,[4] because Wells Fargo failed to answer defendants' Affidavit of Obligation and tendered defendants' payment by an EFT instrument. It is unclear in defendants' "Third Argument" in their appellate opening brief, as to what administrative regulations defendants are relying on, since defendants do not cite any regulations or statutes in their "Third Argument."

Defendants seem to be claiming that they demanded Wells Fargo substantiate the debt Wells Fargo claimed defendants owed and, because Wells Fargo failed to respond to defendants' demand, the debt was discharged. Defendants also appear to be arguing that they tendered payment of the debt they owed under the promissory note and DOT and, because Wells Fargo did not accept or respond to defendants' tender of payment, Wells Fargo forfeited its right to collect the debt. Defendants then proceeded to record various documents declaring that the promissory note and DOT were rescinded, and defendants' debt obligation was discharged.

Defendants' Affidavit of Obligation and $380,000 check, which could not be cashed, served no purpose since the instruments did not provide a means of transferring funds to Wells Fargo. The evidence at trial established that defendants did not repay their mortgage debt and did not provide any legitimate attempt to do so. There was no evidence defendants even possessed in their bank account the amount owed, had they actually provided a valid check or properly initiated electronic transfer of $380,000 from their bank account to Wells Fargo. Since there is no evidence defendants paid the

[4] The Administrative Procedure Act (Gov. Code, § 11340 et seq.), popularly known as the "A.P.A.," is the general administrative procedure statute in California.

debt they owed Wells Fargo or attempted to do so by a legitimate method of payment, defendants have not established that the promissory note and DOT were extinguished by operation of law.

Defendants' reliance on *Randone, supra*, 5 Cal.3d 536 is misplaced. In *Randone*, a collection agency attached the petitioners' checking account under former Code of Civil Procedure section 537, subdivision (1), and the petitioners sought writ relief. The court in *Randone* held that Code of Civil Procedure section 537, subdivision (1), which has since been repealed, violated due process and was unconstitutional in that it authorized the deprivation of a debtor's property before notice or a hearing and without confining the deprivation to extraordinary circumstances justifying the summary procedure. (*Randone*, at pp. 541, 547, 552.) The *Randone* court further held the statute unconstitutional as permitting the attachment of an alleged debtor's necessities of life prior to a hearing on the validity of the alleged creditor's claim. (*Id*. at p. 564.)

Randone has no relevance to the instant matter, in which defendants failed to pay their mortgage since October 2010, and have attempted to circumvent their contractual obligations by executing and recording invalid, legally unenforceable documents, which cloud title to their Property and interfere with the lender's ability to foreclose on defendants' Property. The instant case has nothing to do with Code of Civil Procedure section 537, subdivision (1), which was repealed many years ago. In addition, there is no evidence defendants did not receive proper notice of their obligations under the DOT and promissory note. Defendants have not established any violations of due process or

that their mortgage debt has been extinguished by operation of law under the Administrative Procedure Act.

Defendants argue that they made a legitimate offer to pay the outstanding debt owed under the DOT and promissory note, and the obligation was discharged because Wells Fargo did not accept their offer or object to it. Defendants argue that any deficiencies or objections in their tender of performance were forfeited because Wells Fargo did not object to defendants' tender. But defendants' purported tender of performance was not presented to MERS and the tender was, in effect, no tender at all because it was a sham. Defendants did not initiate or carry out any legitimate method of transferring the funds to Wells Fargo. The check could not be cashed. There was also no proper attempt to transfer funds electronically under the DOT. The DOT defines "Electronic Funds Transfer" as "any transfer of funds, other than a transaction originated by *check,* draft, or similar paper instrument, which is *initiated through an electronic terminal,* telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to: point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers." (Italics added.) There is no evidence defendants completed or even properly initiated such an electronic transfer of funds.

As defendants agreed in the DOT, they were not entitled to reconveyance of their Property under the DOT until they paid in full the loan balance secured by the DOT: "**Reconveyance.** Upon payment of all sums secured by this Security Instrument,

Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. . . ."

Furthermore, defendants agreed that any forbearance by the lender, including refraining from objecting to any demand or violation by defendants, did not constitute a waiver of the lender's rights under the DOT: "**Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower of any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy."

Here, it was agreed under the DOT and promissory note that, even assuming defendants made a proper offer to pay the entire outstanding debt, Wells Fargo's nonresponse did not release defendants from paying their outstanding debt. There was no legal basis for the release of the DOT or discharge of defendants' debt. Defendants did not actually tender payment of $380,000 by electronic transfer of the funds or by

providing a negotiable check for $380,000, payable in cash on demand from an account in which defendants had sufficient funds to cover the check amount. There is no evidence that defendants actually presented Wells Fargo with payment of $380,000 or that Wells Fargo rejected such payment. Merely stating that defendants intended to make such payment and providing a useless check did not constitute proper tender of defendants' outstanding debt, even assuming Wells Fargo did not object or respond.

Furthermore, DeBus testified at trial that he reviewed Fidel's EFT tender letter and informed Fidel that his documents forwarded to Wells Fargo, claiming to tender payment, were not valid US currency, and would not be accepted. There is no evidence defendants tendered any valid currency in payment of their outstanding debt under the DOT. The trial court therefore appropriately concluded defendants' EFT letter dated January 28, 2012, and check for $380,000 did not extinguish the promissory note and DOT by operation of law

VI

HOMESTEAD AND LAND PATENT PROTECTION

Defendants argue the DOT was extinguished when defendants' "declared Homestead and claiming the forever benefits of the existing Land Patent affirmed and held by the Bureau of Land Management [(BLM)], This is the only lawful method that Perfect Title can be held in our names." This argument makes no sense and there is no citation to the record or to any law establishing that the Property was protected BLM land or was subject to a properly imposed homestead or land patent.

"A 'homestead,' for purposes of the automatic homestead exemption, is the

principal dwelling in which the judgment debtor or the debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling and in which the debtor or the debtor's spouse resided continuously thereafter until the date on which the court determined that the dwelling was a homestead. (C.C.P. 704.710(c); on distinction between residence requirements for declared and automatic homestead exemptions, see *Webb v. Trippet* (1991) 235 C.A.3d 647, 651, 286 C.R. 742, infra, §232.) This provision is intended to preclude a judgment debtor from moving into a dwelling after creation of a judgment lien or after levy in order to create an exemption. (Legislative Com. Comment (Senate) to C.C.P. 704.710.)" (8 Witkin, Cal. Procedure (5th ed. 2008) Enforcement of Judgment, § 217, p. 246.) Defendants did not establish at trial that their Property was subject to homestead protection, which precludes MERS from asserting its rights under the promissory note and DOT.

The only case cited by defendants in their appellate opening brief in support of their contention their property is subject to homestead and land patent protection is *Wilcox v. Jackson* (1839) 38 U.S. 498, which is an incredibly old case concerning "recovery of a part of the military post of Fort Dearborn, at Chicago, in the state of Illinois; the defendant being then in possession of the premises as the commander of the post." (*Id*. at p. 499.) *Wilcox* does not provide persuasive authority in support of defendants' contention that homestead and land patent protections preclude cancellation of defendants' release and reconveyance instruments.

Defendants argue in their appellate reply brief that their Property is protected by a land patent. Since the argument was not raised in their appellate opening brief, it has

been forfeited. Failure to raise an issue in the opening brief waives the argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *In re Ricky H.* (1992) 10 Cal.App.4th 552, 562 ["an appellate court will generally decline to consider any questions not raised in the opening brief"].)

Even if not forfeited, the argument has no merit. Defendants have not established the Property is protected by a land patent, and also have not intelligibly explained, either in the trial court or in the present appeal, how a land patent could conceivably assist them in this case. (See *Virgin v. County of San Luis Obispo* (9th Cir. 2000) 201 F.3d 1141, 1143.) During the trial, Fidel told the court that on September 17, 2012, he executed a declaration of homestead, and recorded it on September 18, 2012. Fidel also stated that in the homestead declaration, he claimed "the forever benefit of the land patent, which is recorded and held in the Bureau of Land Management proving that we are the lawful owner." Fidel attempted to introduce into evidence a certified copy of the declaration of homestead (Exh. 16). The trial court sustained MERS's relevancy objection to the document and excluded the homestead declaration from evidence.

Furthermore, as demonstrated by the trial court's exclusion of the homestead declaration, defendants' contentions based on homestead and land patent protections are irrelevant to MERS's complaint, which seeks cancellation of the reconveyance and release documents impeding foreclosure.

VII

RESTRAINING ORDER

Defendants contend the trial court abused its discretion in entering a restraining order prohibiting defendants from recording any additional documents concerning the Property with the County of San Bernardino Recorder without prior permission and order of the trial court. Defendants argue the trial court found they were the legal owners of the Property and, as the Property owners, they have the right to record any further documents they so desire and cannot be deprived of their constitutional property rights without due process. Defendants also assert the restraining order violates their due process rights because MERS did not request a restraining order in its complaint.

During closing argument, MERS's attorney requested the trial court issue a restraining order against defendants, which prohibited defendants from recording additional documents encumbering the Property. MERS's attorney acknowledged MERS had not made such a request in its complaint but believed the trial court nevertheless had discretion to issue a restraining order under the complaint prayer "[f]or such other and further relief as the Court may deem just and proper." The trial court accordingly ordered the requested restraining order, explaining: "Now, Mr. and Mrs. Padua, you are the legal owners of this property until a foreclosure is processed. But the lien that's currently held by Wells Fargo has a first priority. They're going to be able to file a notice of default and commence foreclosure proceedings. And if you don't cure this . . ., the foreclosure is going to go through. [¶] And you are not allowed to record any further documents with respect to this property. You are not allowed to go down

[to] the county recorder's office and file another document that has no legal effect or meaning. You must come to this Court and ask permission and obtain court approval before you can record any documents against this property."

Under the circumstances in this case, in which defendants inappropriately recorded documents that clouded title and impeded foreclosure proceedings on the Property, the trial court did not abuse its discretion or violate defendants' rights in ordering defendants restrained for recording additional documents concerning the Property. "Indeed, it is a rule of long standing that when an answer is filed a court may grant any relief consistent with the issues raised." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1115, fn. 6; see *Wright v. Rogers* (1959) 172 Cal.App.2d 349, 367-368.) "Thus, when an answer is filed, the case becomes one in which the court is authorized regardless of the prayer to grant any relief consistent with the plaintiff's averments. The jurisdiction of the court to grant any particular relief depends not on the prayer but on the issues—that is, on the scope of the complaint and the issues made or which might have been made under it—and any relief consistent with the issues raised may be granted regardless of the prayer. [Citations.]" (*Wright*, at pp. 367-368.)

The restraining order in the instant case is well within the scope of "such other and further relief as the Court may deem just and proper" and the court's broad equitable powers. The evidence presented at trial demonstrated defendants' propensity to file inappropriate documents clouding the Property's title and to persistently raise groundless arguments in an attempt to avoid repaying their mortgage loan. The restraining order does not unreasonably deprive defendants of their constitutional

property and due process rights because the order constitutes relief reasonably related to the relief prayed for in the complaint and does not completely bar defendants from recording documents relating to the Property. Defendants can continue to record documents that are appropriate and well founded, upon obtaining trial court approval.

VIII

DISPOSITION

The judgment is affirmed. MERS is awarded its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

KING
J.